No. 17-532

IN THE

Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Writ of Certiorari to the District Court of Wyoming, Sheridan County

BRIEF OF *AMICUS CURIAE* SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. *RACE HORSE* AROSE FROM THE MURDER OF BANNOCK INDIANS BY SETTLERS, NOT FROM A CONFLICT BETWEEN THE INDIANS' TREATY RIGHTS AND STATE CONSERVATION INTERESTS	7
A. The Murders	8
B. The Conspiracy	10
II. THE *MILLE LACS* DECISION ESTABLISHES *RACE HORSE* HAS NO CONTINUING LEGAL FORCE	16
III. APPLYING THE RULES OF TREATY CONSTRUCTION SET FORTH IN *MILLE LACS* CONFIRMS THAT THE TRIBES RETAIN THEIR RIGHTS UNDER ARTICLE 4 OF THE 1868 TREATY	18
IV. THE TRIBES EXERCISE CO-MANAGEMENT OF THEIR OFF-RESERVATION TREATY HUNTING AND FISHING RIGHTS	26
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page(s)
Antoine v. Washington, 420 U.S. 194 (1975)	17
Brown v. Bd. of Educ., 347 U.S. 483 (1954)	8
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	24
Choctaw Nation v. United States, 318 U.S. 423 (1943)	26
Geer v. Connecticut, 161 U.S. 519 (1896)	25
Kleppe v. New Mexico, 426 U.S. 529 (1976)	17
Menominee Tribe v. United States, 391 U.S. 404 (1968)	16, 17
Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)	*passim*
Missouri v. Holland, 252 U.S. 416 (1920)	17
Plessy v. Ferguson, 163 U.S. 537 (1896)	8
Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968)	17, 25
Seufert Bros. Co. v. United States, 249 U.S. 194 (1919)	24
Shoshone-Bannock Tribes v. Fish & Game Comm'n, 452 F.3d 1278 (9th Cir. 1994)	22

TABLE OF AUTHORITIES—Continued

Page(s)

State v. Arthur,
261 P.2d 135 (Idaho 1953) 25

State v. Cutler,
708 P.2d 853 (Idaho 1985) 19

State v. Holtry,
559 P.2d 756 (Idaho 1977) 19

State v. Lewis,
536 P.2d 738 (Idaho 1975) 19

State v. McCoy,
387 P.2d 942 (Wash. 1963) 25

State v. Tinno,
497 P.2d 1386 (Idaho 1972) ..... *passim*

Tulee v. Washington,
315 U.S. 681 (1942) 25

United States v. Dion,
476 U.S. 734 (1986) 6, 16

United States v. Forty-Three Gallons of Whiskey,
93 U.S. 188 (1876) 17

United States v. Shoshone Tribe,
304 U.S. 111 (1938) 4, 21, 23

United States v. Winans,
198 U.S. 371 (1905) 17, 19, 25

Ward v. Race Horse,
163 U.S. 504 (1896) ..... *passim*

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,
443 U.S. 658 (1979) 8, 16, 17, 19

TABLE OF AUTHORITIES—Continued

CONSTITUTION — Page(s)

U.S. Const. art. VI, cl. 2 17

TREATIES

Treaty with the Eastern Shoshoni, art. IV, July 2, 1863, 18 Stat. 686 4

Treaty with the Western Shoshoni, art. V, Oct. 1, 1863, 18 Stat. 690 4

Treaty of Soda Springs, Oct. 14, 1863 (unratified), *reprinted in* V *Indian Affairs, Law and Treaties* (Charles J. Kappler ed., 1904) 4

Treaty of Fort Boise, Oct. 10, 1864 (unratified) 4, 20

Caleb Lyon's Bruneau Treaty, Apr. 12, 1866 (unratified) 4, 20

Treaty with the Crow Indians, art. 4, May 7, 1868, 15 Stat. 650 2

Treaty of Fort Bridger, July 3, 1868, 15 Stat. 673 ..... *passim*

art. 1, 15 Stat. 673 ..... 13, 21

art. 2, 15 Stat. 674 ..... 1, 5

art. 4, 15 Stat. 674-675 ..... *passim*

STATUTES AND EXECUTIVE ORDERS

Wyoming Admission Act of July 10, 1890, ch. 664, 26 Stat. 222 ..... 2, 16, 17

TABLE OF AUTHORITIES—Continued

Page(s)

Exec. Order of President Andrew Johnson (June 14, 1867), *reprinted in* I *Indian Affairs, Law and Treaties* (Charles J. Kappler ed., 1904) 1, 4, 20

Exec. Order of President Ulysses Grant (July 30, 1869), *reprinted in* I *Indian Affairs, Law and Treaties* (Charles J. Kappler ed., 1904)..... 1

TRIBAL LAWS AND INTERGOVERNMENTAL AGREEMENTS

Shoshone-Bannock Tribes:

Tribal Law & Order Code ch. XVI..... 26

Fish & Game Comm'n, *2018-2019 Big Game Hunting Regulations* (2018)..... 26, 27

BPA, Adm'r's Record of Decision, 2008 Columbia Basin Fish Accords Memo. of Agreement with Shoshone-Bannock Tribes (Nov. 2008)..... 28

BPA, Adm'r's Record of Decision & Resp. to Comments, S. Idaho Wildlife Mitigation Memo. of Agreement (2014), *available at* https://www.bpa.gov/news/pubs/RecordsofDecision/rod-20140923-Southern-Idaho-Wildlife-Mitigation-Memorandum-of-Agreement.pdf..... 28

Memo. of Agreement between Nat'l Elk Refuge & Shoshone-Bannock Tribes (2017)..... 27

TABLE OF AUTHORITIES—Continued

Page(s)

Southern Idaho Wildlife Mitigation Agreement, BPA & Shoshone-Bannock Tribes (1997) 27

STATE CONSTITUTION

Idaho Const. art. 5 § 9 19

COURT FILINGS

Br. of United States, *Amicus Curiae*, *State v. Tinno*, 497 P.2d 1386 (Idaho 1972) (No. 10737) 21, 22

OTHER AUTHORITIES: HISTORICAL RECORDS

Annual Report of the Secretary of the Interior (1895), *reprinted in Message from the President to the Two Houses of Congress* (1896), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015087536861;view=2up;seq=6 ..... 13, 14, 15

Annual Report of the Secretary of the Interior (1896), *reprinted in Message from the President to the Two Houses of Congress* (1897), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015087536853;view=1up;seq=10 15

Jail Record of Uinta County Wyoming (1895) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Letter from Caleb Lyon, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Sec'y of Interior (Apr. 16, 1866), *microfilm at* Nat'l Archives & Records Admin., Microcopy T-474, Roll 9 ... 4, 20

Letter from Caleb Lyon, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Sec'y of Interior (Oct. 20, 1864), *microfilm at* Nat'l Archives & Records Admin., Microcopy 234, Roll 337 4

Letter from D.W. Ballard, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Comm'r of Indian Affairs (June 30, 1867), *microfilm at* Nat'l Archives & Records Admin., Microcopy 234, Roll 337 ..... 4, 20

Letter from Thomas Teter, Indian Agent, Fort Hall Agency, to Comm'r of Indian Affairs (Oct. 10, 1895), *available at* Nat'l Archives & Records Admin., Record Grp. 75, Entry 91, Letters Received, Box 1248 ..... 14, 15

Report from C.C. Augur, Brevet Major-Gen., to President, Indian Peace Comm'n (Oct. 4, 1868), *reprinted in Papers Relating to Talks and Councils Held with the Indians in Dakota and Montana Territories in the Years 1866-1869* (GPO 1910) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Report from Province McCormick, Indian Inspector, to Sec'y of Interior (Oct. 6, 1895), *available at* Nat'l Archives & Records Admin., Record Grp. 75, Entry 90, Letters Received, Box 1249 15

U.S. Dep't of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* (1895) *reprinted in* H.R. Doc. No. 5 Report of the Secretary of Interior to Congress (1896), *available at* http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=browse&scope=HISTORY.COMMREP .....*passim*

William Clark & Meriwether Lewis, *The Journals of Lewis and Clark* (Bernard DeVoto, ed., Amazon Kindle 2016)..... 3

INTEREST OF *AMICUS CURIAE*[1]

The amicus curiae Shoshone-Bannock Tribes ("Tribes") is a federally recognized Indian tribe, 83 Fed. Reg. 4235, 4238 (Jan. 30, 2018), occupying the Fort Hall Reservation in Idaho, pursuant to the Treaty of Fort Bridger, art. 2, July 3, 1868, 15 Stat. 673 ("Fort Bridger Treaty" or "1868 Treaty"), and companion executive orders,[2] and exercising rights to hunt, fish, and gather on unoccupied lands of the United States pursuant to Article 4 of the 1868 Treaty.[3] *See State v. Tinno*, 497 P.2d 1386, 1389-91 (Idaho 1972). The Tribes' interest in this case arises from the reliance that the court below placed on *Ward v. Race Horse*, 163 U.S. 504 (1896), in ruling that Wyoming's statehood extinguished the Crow Tribe's off-reservation treaty

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for Amicus states no counsel for a party authored this brief in whole or in part, and no person or entity other than Amicus and its counsel made any monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of *amicus curiae* briefs in letters filed with the Clerk.

[2] The Reservation was first set aside by an 1867 Executive Order. Executive Order of President Andrew Johnson (June 14, 1867), *reprinted in* I *Indian Affairs, Law and Treaties* 836-37 (Charles J. Kappler ed., 1904) ("Kappler"). The provisions of the 1868 Treaty promising the Reservation to the Tribes were then implemented by an 1869 Executive Order. Executive Order of President Ulysses Grant (July 30, 1869), *reprinted in* I Kappler at 838-39.

[3] Article 4 provides the Shoshone-Bannock Tribes "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty art. 4.

right.[4] *See* Pet. App. 31-34. *Race Horse* was effectively overruled by this Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-08 (1999), and as the Tribes' off-reservation hunting rights in Wyoming[5] were put at issue in *Race Horse*, the Tribes are keenly interested in the proper application of *Mille Lacs*. The Tribes submit this brief to show that *Race Horse* was overruled in *Mille Lacs*, and that the historical record confirms that *Race Horse* was wrongly decided. First, *Race Horse* did not arise from a conflict between off-reservation treaty rights to hunt and the conservation of natural resources by the State. It instead arose from the murder of Bannock Indians by a posse of non-Indians, led by the local constable, who sought to keep the Indians from hunting in the Jackson Hole country to protect business interests of local hunting guides. As federal officials later found, the non-Indians had "a premeditated and pre-arranged plan to kill some Indians and thus stir up sufficient trouble to subsequently get United States troops into the region and ultimately have the Indians shut out from Jackson Hole. The plan was successfully carried out and the desired results obtained."[6] Treaty rights

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[4] The Crow Tribe's off-reservation rights are set out in Article 4 of the Treaty of May 7, 1868, 15 Stat. 649. Pet. App. 34.

[5] *Race Horse* addressed the effect of Wyoming's admission to statehood on the off-reservation hunting rights held under the Fort Bridger Treaty within the state of Wyoming, *Race Horse*, 163 U.S. at 507 (sole question presented concerns the treaty right to hunt "within the limits of the State of Wyoming"); *id.* at 514 (concluding the treaty right was repealed by the Wyoming admission act "in so far as the lands in [the hunting] districts are now embraced within the limits of the state of Wyoming").

[6] U.S. Dep't of Interior, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 77 (1895) ("1895

to hunt, fish, and gather off-reservation are not irreconcilable with state sovereignty over natural resources, *Mille Lacs*, 526 U.S. at 204, and the bare resistance to those rights that led to *Race Horse* furnishes no basis for their denial. Second, when the Fort Bridger Treaty is interpreted in conformance with the rules of treaty construction set forth in *Mille Lacs*, 526 U.S. at 196, 200, it is clear that Article 4 of the 1868 Treaty was intended to secure to the Tribes the right to hunt, fish, and gather on unoccupied lands of the United States in Wyoming, as elsewhere, for as long as game is to be found on those lands.

STATEMENT OF FACTS

For generations, the Shoshone and Bannock Indians migrated widely to obtain subsistence resources. *See* William Clark & Meriwether Lewis, *The Journals of Lewis and Clark* 1384 (Bernard DeVoto ed., Amazon Kindle 2016) (entry for Aug. 19, 1805). The Tribes negotiated treaties with the United States throughout the mid-19th century, and their reliance on hunting, fishing, and gathering was well-known to the United States as a result of those negotiations. In the mid-1860s, the United States and the Tribes negotiated a series of treaties securing tribal hunting, fishing, and gathering rights over a large area. In 1863, the United States negotiated three treaties—two of which were ratified—which established a reservation of over 44 million acres for the Eastern Shoshone, *see* Treaty

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ARCIA") (quoting Report of U.S. Att'y for Wyo.). The Annual Reports of the Commissioner of Indian Affairs were reprinted in the Secretary of the Interior's Annual Reports to Congress, which were printed as House Documents in the following year. *See* H.R. Doc. No. 5 (1896) (reprinting 1895 ARCIA). They are also *available at* http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=browse&scope=HISTORY.COMM REP.

with the Eastern Shoshoni, art. IV, July 2, 1863, 18 Stat. 685; *United States v. Shoshone Tribe*, 304 U.S. 111, 113 (1938), and recognized the expansive territories of other Shoshone and Bannock Bands, Treaty with the Western Shoshoni, art. V, Oct. 1, 1863, 18 Stat. 689; Treaty of Soda Springs, Oct. 14, 1863 (unratified), *reprinted in* V Kappler at 693. After 1863, Shoshone bands negotiated two other unratified treaties that ceded lands to the United States and reserved tribal fishing rights in the ceded lands. Treaty of Fort Boise, Oct. 10, 1864 (unratified);[7] Caleb Lyon's Bruneau Treaty, Apr. 12, 1866 (unratified).[8] And in 1867, when President Andrew Johnson established the Fort Hall Reservation for the Bannocks and Shoshone by Executive Order, *see* Executive Order of June 14, 1867, the Bannock chiefs informed the United States they would only move there if they could leave it to hunt and fish.[9]

In 1868, the United States and the Tribes negotiated the Fort Bridger Treaty. During the negotiations, the lead U.S. negotiator explained the new reservation would be the Indians' permanent home, but they would have "permission to hunt wherever you can find

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[7] Enclosed with Letter from Caleb Lyon, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Sec'y of Interior (Oct. 20, 1864), *microfilm at* Nat'l Archives & Records Admin. ("NARA"), Microcopy 234, Roll 337.

[8] Enclosed with Letter from Caleb Lyon, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Sec'y of Interior (Apr. 16, 1866), *microfilm at* NARA, Microcopy T-474, Roll 9 ("1866 Lyon Letter").

[9] Letter from D.W. Ballard, Governor & ex officio Superintendent of Indian Affairs, Idaho Territory, to Comm'r of Indian Affairs (June 30, 1867), *microfilm at* NARA, Microcopy 234, Roll 337 ("1867 Ballard Letter").

game." Report from C.C. Augur, Brevet Major-Gen., to President, Indian Peace Comm'n (Oct. 4, 1868), *reprinted in Papers Relating to Talks and Councils Held with the Indians in Dakota and Montana Territories in the Years 1866-1869* 116 (GPO 1910) ("Augur Report"). The Shoshone Chief Washakie responded he wanted a reservation on the Wind River but also "the privilege of going over the mountains to hunt where I please," and Bannock Chief Taghee stated "as far away as Virginia City [Montana] our tribe has roamed. But I want the Porte-Neuf country and the Kamas Plains" for the Bannock Reservation. *Id.* at 117-18. These negotiations resulted in the Treaty of Fort Bridger, in which the Tribes ceded the 1863 Treaty reservation in exchange for new reservations in Wyoming and Idaho, art. 2, while reserving the right, off-reservation, "to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among whites and Indians on the borders of the hunting districts," *id.* art. 4.

SUMMARY OF ARGUMENT

The murder of Bannock Indians, not the killing of elk, led to the *Race Horse* case. On July 15, 1895, a party of Bannock Indians and their families were hunting for subsistence purposes in the area known as the Jackson Hole country, Wyoming when they were surrounded by a posse of settlers led by the local constable. The Indians were disarmed, and marched under guard. When the Indians fled because they believed they were to be killed, the settlers shot at the Indians. Two Indians, an elderly blind man and an infant, were killed as a result of the attack. The settlers sought to keep the Indians from hunting in that area to protect business interests of local hunting guides and initiated

the confrontation to get the Indians' rights before the courts. As the local constable stated: "We knew very well when we started in on this thing that we would bring matters to a head. We knew someone was going to be killed, perhaps some on both sides, and we decided the sooner it was done the better, so that we could get the matter before the courts." 1895 ARCIA at 76. The killers were never prosecuted. Instead, the settlers' opposition to the Indians' rights resulted in the *Race Horse* case being brought.

This history shows "*Race Horse* rested on a false premise" not only because off-reservation treaty rights to hunt, fish, and gather are not irreconcilable with state sovereignty over natural resources, *Mille Lacs*, 526 U.S. at 204, but also as a matter of fact. Resistance to federal rights was the source of the conflict in *Race Horse*, which provides an additional reason for overruling that decision. This Court did so in *Mille Lacs* by reaffirming that to abrogate an Indian treaty right, "[Congress] must clearly express its intent to do so," *Mille Lacs*, 526 U.S. at 202 (citing *United States v. Dion*, 476 U.S. 734, 738-40 (1986)); by holding that a state's admission to the Union on an equal footing does not abrogate treaty rights to hunt, fish, and gather off-reservation because those rights are not irreconcilable with state sovereignty, *Mille Lacs*, 526 U.S. at 203-06; and by making clear that when a treaty "itself defines circumstances under which the rights terminate," and those defined circumstances do not include "when a State was established in the area," the rights are intended to and do survive statehood. *Id.* at 206-07. Finally "[t]reaty rights are not impliedly terminated upon statehood." *Id.* at 207. The "*Race Horse* Court's decision to the contrary" is no longer the law, as it was informed by that Court's conclusion that Indian treaty rights are

inconsistent with state sovereignty and thus could not have been intended to survive statehood. *Id.* at 207-08. Accordingly, the court below erred, and its decision should be reversed.

The *Mille Lacs* Court also made clear that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them," *id.* at 196 (citations omitted), and that "Indian treaties are to be interpreted liberally in favor of the Indians, and . . . any ambiguities are to be resolved in their favor." *Id.* at 200 (citations omitted). When Article 4 of the 1868 Treaty is so interpreted, it confirms that the Tribes retain their right to hunt, fish, and gather on unoccupied lands of the United States in Wyoming, as they do in Idaho under the ruling of the Idaho Supreme Court in *Tinno*.[10]

ARGUMENT

I. *RACE HORSE* AROSE FROM THE MURDER OF BANNOCK INDIANS BY SETTLERS, NOT FROM A CONFLICT BETWEEN THE INDIANS' TREATY RIGHTS AND STATE CONSERVATION INTERESTS.

Race Horse did not arise from the killing of elk by Indians; but from the actions of settlers who got away with murder. Non-Indian settlers determined to deny the Indians their federal rights killed Bannock Indians to get their opposition to those rights to

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[10] The Tribes also join Petitioner's argument that *Mille Lacs* overruled *Race Horse*, Pet. Br. at 23-32, and his argument that the creation of the Big Horn National Forest did not terminate Treaty off-reservation hunting rights, *id.* at 32-40, as well as the argument of Amici Curiae Natural Resource Law Professors on the latter issue.

court. Thus, "*Race Horse* rested on a false premise" not only because off-reservation treaty rights are not irreconcilable with state sovereignty over natural resources as a matter of law, *Mille Lacs*, 526 U.S. at 204, but also as a matter of fact. Resistance to federal rights does not justify their denial, which provides an additional reason for rejecting *Race Horse*. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 694-96 & n.36 (1979) (federal court has power to order remedial action necessary to protect treaty fishing rights); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

The facts that led to the *Race Horse* case, as shown by the federal government's investigation of the incident, are as follows.

A. The Murders

On July 17, 1895, Governor Richards of Wyoming informed the Interior Department that nine Bannock Indians from Fort Hall had been arrested for illegally killing game, one had been killed, and the others had escaped. 1895 ARCIA at 63 (quoting Telegram from William Richards, Governor, Idaho Territory, to Dep't of Interior (Jul. 17, 1895) (quoting Telegram from Frank H. Rhodes, Justice of Peace, et al., to William Richards, Governor, Idaho Territory (n.d.))). The same day, the Commissioner of Indian Affairs directed the Fort Hall and Shoshone Indian agents to go to the scene to prevent further conflict and to have the Indians return to their respective Reservations. *Id.* at 63-64. The Fort Hall agent reported that the Sheriff who investigated the conflict had said the Indians had not molested the settlers. *Id.* at 64.

The Commissioner subsequently received several official reports on the incident. The Indian agents for the Fort Hall Agency reported that the Bannock and Shoshone Indians hunted "for sustenance," *id.* at 66 (quoting Report of Captain Van Orsdale, Acting Indian Agent (July 20, 1895)), had been hunting in the Jackson Hole country for many years, and that objections had arisen "only since the business of guiding tourists in search of big game has become so remunerative." *Id.* at 67 (quoting Report of Thomas Teter, Indian Agent, Fort Hall Agency (Jul. 24, 1895)). Agent Teter also reported the Indian account of the incident, as follows: A hunting party of nine Indians and their families were encamped on a stream in Uinta County when they were surrounded by twenty-seven armed settlers. The Indians were disarmed, the men were placed in one group, their families in another, both under guard. "The Indians, roughly treated, were driven throughout the day they knew not where, and as evening closed in the party approached a dense wood, upon which the leader of the settlers spoke to his men, and they examined their arms, loading all empty chambers." *Id.* at 68 (quoting Report of Thomas Teter, Indian Agent, Fort Hall Agency (Aug. 7, 1895)). The Indians, believing they were to be killed, "made a break for liberty; whereupon the settlers without warning opened fire, the Indians seeing two of their number drop from their horses." *Id.* The following morning, the Indians gathered together and found they were missing two men and two infants. They revisited the scene, but could not find the missing persons or their belongings. They then returned to the Reservation. *Id.* One of the men believed to have been killed had been found. "He had been shot through the body from the back" and had "subsist[ed] for seventeen days upon the food which he had in his wallet at the

time he was shot." *Id.* The body of another Indian, who had also been shot in the back, was later discovered and buried by Indian scouts. One of the two infants was found alive, and the other, only six months old, was not found and was presumed to have died. *Id.*

The Commissioner concluded that the Bannocks "have, in the opinion of this office, been made the victims of a planned Indian outbreak by the lawless whites infesting the Jacksons Hole country with the idea of causing their extermination or their removal from that neighborhood." *Id.* at 70. The Commissioner had referred the incident to the Department of Justice, and reported that the Attorney General had responded he was not aware of any law under which the Department of Justice could assist in "punishing, civilly or criminally, the persons who have done them injury, even the murderers." *Id.* at 74-75. On August 30, the Acting Attorney General restated this conclusion. *Id.* at 75.

B. The Conspiracy

The Acting Attorney General also provided to the Commissioner the United States Attorney's report on the incident. The United States Attorney reported that professional guides viewed Indian hunting in the Jackson Hole country as a threat to their businesses. They "decided at the close of last season to keep the Indians out of the region this year, and the events of this summer are the results of carefully prepared plans." *Id.* at 76. "Constable Manning said: 'We knew very well when we started in on this thing that we would bring matters to a head. We knew some one was going to be killed, perhaps some on both sides, and we decided the sooner it was done the better, so that we could get the matter before the courts.'" *Id.* The

United States Attorney found that the agreed-upon plan was executed as follows:

> Constable Manning and 26 deputies surrounded a camp of 10 bucks and 13 squaws at night, and early in the morning with guns leveled at the Indians made the arrest, the Indians offering no resistance. The arrest was made on Fall River, 55 miles from Marysvale. The warrant was for Bannock and Shoshone Indians, the names and number of the Indians to be arrested not being stated. After the arrest was made, the arms, meat, and other articles in the possession of the Indians were taken from them. Constable Manning also took their passes, ration checks, etc. These papers gave the names and residences of most of the Indians. From an interview with Nemits, an Indian boy, who was one of the party of Indians arrested and shot, and from interviews with several of Mr. Manning's posse, I learned that the constable and his men told the Indians some of them would be hung and some would be sent to jail and that this was believed by the Indians. The constable also said in the hearing of the Indians, some of whom understood English, that if the Indians attempted to escape the men should shoot their horses.
>
> * * *
>
> They believed the threats of being sent to jail and of being hung were true, and they saw no trick in Manning's instructions, given in their hearing, to shoot their horses if they tried to get away.

* * *

> From Mr. Manning I learned that none of the horses of the escaping party of Indians were shot, notwithstanding his order, but that at least six Indians were hit by bullets. Of these, Timeha, an old man, was killed; Nimits, a boy of about 20, was wounded so that he could not escape, and the others got away. Constable Manning said to me: "The old Indian was killed about 200 yards from the trail. He was shot in the back and bled to death. He would have been acquitted had he come in and stood his trial, for he was an old man, almost blind, and his gun was not fit to kill anything."
>
> When the body of this old, sick, blind man was found after lying unburied in the woods for about twenty days it was found he had been shot four times in the back. The boy, Nemits, who was wounded, was shot through the body and arm. He was left on the ground where the shooting occurred, and remained there, living on some dried meat for ten days. He crawled for three nights to reach a ranch of a man friendly to Indians, and was seventeen days without medical attendance.

Id. at 76-77. The United States Attorney concluded as follows:

> The whole affair was, I believe, a premeditated and prearranged plan to kill some Indians and thus stir up sufficient trouble to subsequently get United States troops into the region and ultimately have the Indians shut out from Jacksons Hole. The plan was

> successfully carried out and the desired results obtained.

Id. at 77.

The Commissioner subsequently directed Agent Teter to obtain evidence of the incident at Jackson Hole. *Id.* at 78 (quoting 1868 Treaty, art. 1 (authorizing the arrest and punishment of "bad men among the whites" for "any wrong upon the person or property of the Indians" "upon proof made to the agent and forwarded to the Commissioner.")). That evidence was provided in two affidavits. The first recounted that the Wyoming Governor had agreed to protect the justice of the peace who issued the arrest warrants for Bannocks hunting in Wyoming if trouble with the United States arose from the Bannocks' arrest. *Id.* at 78-79 (quoting Aff. of Ravenal Macbeth (Sept. 3, 1895)). The second affidavit recited the facts of the incident. *Id.* at 79 (quoting Aff. of Ben Senowin (Sept. 1, 1895)). Agent Teter also furnished the names of the men who committed the assault. *Id.* at 80. The Commissioner requested the United States take action under Article 1 of the 1868 Treaty to arrest and punish the offenders under federal law. *Id.*

The Secretary of the Interior reported on this matter to the President. *See Annual Report of the Secretary of the Interior* (1895), *reprinted in Message from the President to the Two Houses of Congress* 677 (1896).[11] His report recognized the Tribes' right to hunt on unoccupied lands of the United States under Article 4 of the 1868 Treaty, stated that they had for many years gone "to the Jackson's Hole country to hunt game for subsistence," *id.* at 686-87, and summarized

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[11] *Available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015087536861;view=2up;seq=6.

the facts of the incident, *id.* 687-88. The Secretary further reported "the Department of Justice had 'again taken under consideration the question of prosecuting the whites who committed the outrages upon the Indians in the Jacksons Hole country,' and the United States attorney for Wyoming had been instructed to indict the parties and prosecute the case with vigor." *Id.* at 688 (quoting Message from Att'y Gen. (Sept. 24, 1895)).

The Secretary also said the Department had instructed Province McCormick, an Inspector for the United States Indian Service, to meet with the Governor of Wyoming. If the Governor would not agree to recognize the Indians' treaty rights, the Inspector was to propose that the Indians' rights be determined by having an Indian arrested and charged in state court, after which the United States Attorney would seek the Indian's release by writ of habeas corpus in Wyoming federal court. *Id.* at 688-89. If the Governor agreed to that proposal, the Inspector was to "secure the arrest of an Indian through the Fort Hall agent," notify the Department, and call a council with the Indians at Fort Hall to explain the action taken by the Department. The Secretary further reported that: the Governor had agreed to the proposal; two Indians were arrested and taken to Evanston, Wyoming, "under the charge of the Indian agent" and an interpreter;[12] a council with the Indians was held and "they

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[12] The Indians were not made aware of their arrest. Agent Teter accompanied Race Horse and another Bannock Indian to Evanston and reported "the Indians, though in the custody of the Sheriff, are not aware of the fact of their arrest and, it is my intention to keep them in ignorance, owing to the bad effect it would have upon the Indians on the reservation." Letter from Thomas Teter, Indian Agent, Fort Hall Agency, to Comm'r of Indian Affairs (Oct. 10, 1895), *available at* NARA, Record Grp.

all agreed to rely implicitly upon the Government to redress their wrongs—pledging themselves to abstain from any attempts at revenge for the outrages committed upon their people;"[13] the Indians' release was sought on writs of habeas corpus; and the federal court had "held the laws of Wyoming invalid against the Indians' treaty." *Id.* at 689.

In his 1896 report to the President, the Secretary described this Court's decision in *Race Horse*, and reported the Attorney General had determined "there was no statute of the United States under which any assistance could be afforded" to address the killing of Bannock Indians hunting in the Jackson Hole country. *Annual Report of the Secretary of the Interior* (1896), *reprinted in Message from the President to the Two Houses of Congress* 829 (1897).[14] No state or

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75, Entry 91, Letters Received, Box 1248. It is unknown how Agent Teter accomplished this. The certified copies of the jail records do not indicate Race Horse or any other Indians were incarcerated in that jail at the relevant times. *See Jail Record of Uinta County Wyoming* 58-61 (1895), enclosed with Letter from Doug Matthews, Sheriff, Uinta Cnty. (July 2, 2018).

[13] The Shoshone and Bannock Indians were not told that would be the federal government's only response to the killings. Furthermore, Inspector McCormick told the Secretary while he was confident the Treaty rights would be upheld by the courts, he was equally confident the non-Indians in the region would never abide by a court ruling because they were lawless and reckless and of the view that "*shooting down defenseless Indians is a greater source of revenue in the end than the tilling of the soil. They realize that it is not a crime in Wyoming to shoot an Indian.*" Report from Province McCormick, Indian Inspector, to Sec'y of Interior (Oct. 6, 1895), *available at* NARA, Record Grp. 75, Entry 90, Letters Received, Box 1249 (emphasis added). Inspector McCormick's last observation proved to be correct.

[14] *Available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015087536853;view=1up;seq=10.

federal prosecution was ever brought for the murder of the Indians, as the United States Attorney had feared would be the case.[15]

In sum, *Race Horse* was premised on resistance to Indian rights, not a conflict over the conservation of natural resources.

II. THE *MILLE LACS* DECISION ESTABLISHES *RACE HORSE* HAS NO CONTINUING LEGAL FORCE.

Mille Lacs overruled *Race Horse* for the following reasons. First, as the *Mille Lacs* Court made clear, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202 (citing *Dion*, 476 U.S. at 738-40; *Passenger Fishing Vessel*, 443 U.S. at 690; *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968)). "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve conflict by abrogating the treaty.'" *Id.* (quoting *Dion*, 476 U.S. at 740). The Wyoming Admission Act provides no such clear evidence because it simply provides "the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects

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[15] In August of 1895, the United States Attorney had stated "there are no officials in Jacksons Hole—county, State, or national—who would hold any of Manning's posse for trial. Either the anti-Indian proclivities of these officials or the fear of opposing the dominating sentiment of the community on this question would lead them to discharge all of these men should they be brought before them for a hearing." 1895 ARCIA at 77.

whatever; . . ." Act of July 10, 1890, ch. 664, 26 Stat. 222.

Second, a state's admission to the Union on an equal footing does not extinguish treaty rights to hunt, fish, and gather off-reservation because Indian treaty rights can "co-exist with state management of natural resources," *Mille Lacs*, 526 U.S. at 203-05. The States' authority over natural resources within their borders "is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making," *id.* (citing U.S. Const. art. VI, cl. 2; *Missouri v. Holland*, 252 U.S. 416 (1920); *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *United States v. Winans*, 198 U.S. 371, 382-84 (1905); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876); *Menominee Tribe*, 391 U.S. at 411 n.12)). Under settled principles the "state [has] authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation," *id.* at 205 (citing *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968); *Passenger Fishing Vessel*, 443 U.S. at 682; *Antoine v. Washington*, 420 U.S. 194, 207-08 (1975)).

Third, the "alternative holding" in *Race Horse* that "[t]he treaty rights at issue were not intended to survive Wyoming's statehood," *Mille Lacs*, 526 U.S. at 206, is no longer the law because *Mille Lacs* makes clear that a treaty right survives statehood unless the treaty states in clear terms that the right terminates when a state is established. *Id.* at 206-07. As the Court observed, the 1868 Treaty "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States." *Id.* at 207. The 1868 Treaty, like the

1837 Chippewa Treaty at issue in *Mille Lacs*, contains "no suggestion" that the Treaty right "should end when a State was established in the area." *Id.* Indeed, by promising that the Tribes "shall have the right to hunt" as long as the specified conditions continue, the possibility of an earlier termination upon statehood is foreclosed.

Fourth, "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* upon statehood," *id.* (emphasis in original) (citations omitted). Accordingly, *Race Horse*'s determination that the rights held under Article 4 of the 1868 Treaty were impliedly repealed is no longer the law. Finally, "[t]he *Race Horse* Court's decision to the contrary—that Indian treaty rights were impliedly repealed by Wyoming's statehood Act—was informed by that Court's conclusion that the Indian treaty rights were inconsistent with state sovereignty over natural resources and thus that Congress (the Senate) could not have intended the rights to survive statehood. But as we described above, Indian treaty-based usufructuary rights are not inconsistent with state sovereignty over natural resources." *Id.* at 207-08.

For all of these reasons, *Race Horse* has been overruled.

III. APPLYING THE RULES OF TREATY CONSTRUCTION SET FORTH IN *MILLE LACS* CONFIRMS THAT THE TRIBES RETAIN THEIR RIGHTS UNDER ARTICLE 4 OF THE 1868 TREATY.

In considering whether a treaty right has been abrogated, the *Mille Lacs* Court emphasized that "an examination of the historical record provides insight

into how the parties to the Treaty understood the terms of the agreement," which is important "because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Id.* at 196 (citing *Passenger Fishing Vessel*, 443 U.S. at 675-76; *Winans*, 198 U.S. at 380-81). The Court also declared that "Indian treaties are to be interpreted liberally in favor of the Indians, and . . . any ambiguities are to be resolved in their favor." *Id.* at 200 (citations omitted). Application of those rules to the 1868 Treaty confirms that the Tribes have the right to hunt and fish on the "unoccupied lands of the United States" under Article 4 of that Treaty, as the Idaho Supreme Court correctly held in *Tinno*.[16]

The historical record leading up to the 1868 Treaty shows the United States was well aware the Shoshone and Bannocks needed to hunt, fish, and gather to survive, and understood those rights had to be promised to the Indians to obtain a cession of their lands; and that the Indians understood treaty negotiations could properly include such rights. Two early unratified

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[16] In *Tinno*, the State appealed from the district court's ruling that the Treaty right exempted the defendant from State regulation and that he was therefore not guilty. *Id.*, 497 P.2d at 1387-88. The Idaho Supreme Court initially held the appeal must be dismissed because it was not authorized by I.C. § 19-2804, but went on to "consider the matter substantively" because of importance of the question presented, the uniqueness of the record made in the case, and the likelihood of the dispute arising again. *Tinno*, 497 P.2d at 1388. The Idaho Supreme Court has since held that *Tinno* was properly considered by the Court under Article 5, § 9 of the Idaho Constitution, which "defines the appellate jurisdiction of this Court," and "gives this Court power to review 'any decision' of the district courts." *State v. Lewis*, 536 P.2d 738, 741 (Idaho 1975); *State v. Holtry*, 559 P.2d 756 (Idaho 1977). *Tinno* was also reaffirmed by the Idaho Supreme Court in *State v. Cutler*, 708 P.2d 853, 857 (Idaho 1985).

treaties with the Tribes expressly reserved tribal hunting, fishing, and gathering rights. The Treaty of Fort Boise of October 10, 1864 reserved the right to fish in the area ceded, and Caleb Lyon's Bruneau Treaty of April 12, 1866 reserved both the right to fish at "accustomed grounds and stations" and "the privilege of hunting and gathering roots on open and unclaimed lands."[17] In the negotiation of the latter treaty, the federal negotiator assured the Indians they could reserve "this [Bruneau] valley for yourselves, and as much more as is necessary for hunting and fishing," and in response, Tcho-wom-ba-ca, or "Biting Bear," explained "[s]kins are our clothes. Deer, [e]lk, [f]ish, [a]ntelope, [r]oots and seeds [are] our food." 1866 Lyon Letter.

The importance to the Tribes of continuing to hunt, fish, and gather even after they moved to a reservation was made clear to federal officials after the President issued an executive order to establish the Fort Hall Reservation in 1867,[18] and the federal government sought the agreement of the Shoshones and Bannocks to move to that reservation. In those negotiations, the Idaho Territorial Governor Ballard inquired "Would [you] like to live on a reservation? Provided we build you houses, teach you [how] to farm, [et]c?" 1867 Ballard Letter. The Bannock headmen responded, "[w]e want to hunt buffalo and to fish," and were only willing to move to a reservation if they were able to leave the reservation to hunt and fish. *Id.*

In the 1868 Treaty, the Shoshone and Bannock ceded lands reserved to them by prior treaty, *see*

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[17] *See supra* nn.7-8.

[18] Executive Order of June 14, 1867, *reprinted in* I Kappler at 836-37.

Shoshone Tribe, 304 U.S. at 113, agreed to move to reservations, and secured the off-reservation hunting, fishing, and gathering rights they had long sought and the United States had long understood were essential to their subsistence. At the treaty negotiations, General Augur explained there were "a great many white men in your country," and their numbers would increase when the railroad was completed. In response to those changes, the government sought to acquire Tribal lands and move the Indians to a reservation. But they could hunt wherever there was game. Augur Report at 116. "Upon this reservation he wishes you to go with all your people as soon as possible, and to make it your permanent home, *but with permission to hunt wherever you can find game.*" *Id.* (emphasis added). Chief Washakie responded, "I want for my home the valley of Wind River and lands on its tributaries as far east as the Popo-agie, and I want the privilege of going over the mountains to hunt where I please." *Id.* at 117. Bannock Chief Taghee stated "as far away as Virginia City [Montana] our tribe has roamed. But I want the Porte-Neuf country and the Kamas Plains" for the Bannock reservation. *Id.* at 118. These terms were agreed to in the 1868 Treaty, under which the Shoshone and the Bannock ceded the Reservation that had earlier been set aside for them, 1868 Treaty art. 1, Reservations were provided for them, *id.*, and they reserved usufructuary rights on "unoccupied lands of the United States." *Id.* art. 4. Nothing was said that would even suggest those rights would last only until a state was established in the area.

In upholding the rights held by the Tribes under the 1868 Treaty,[19] the Idaho Supreme Court in *Tinno*

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[19] The United States filed an amicus brief in *Tinno*, in which it maintained its position the Tribes hold the right to hunt on

recognized the importance of the historical record to the interpretation of the treaty:

> We are of the opinion that the special consideration which is to be accorded the Fort Bridger Treaty fishing right must focus on the historical reason for the treaty fishing right. The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaty.

Tinno, 497 P.2d at 1393.[20] The court also recognized its obligation to interpret the 1868 Treaty as the Indians understood it. *Id.* at 1391 (citations omit-

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unoccupied lands of the United States under the Fort Bridger Treaty. Br. of United States, *Amicus Curiae*, *State v. Tinno*, 497 P.2d 1386 (Idaho 1972) (No. 10737).

[20] The Ninth Circuit recognized the Tribes' rights in *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 452 F.3d 1278 (9th Cir. 1994), in which the Tribes alleged state officials had violated their Treaty rights. The court held that "[p]ursuant to Article 4 of the [1868 Treaty], the Tribes retain the right to 'hunt on unoccupied lands of the United States.'" *Id.* at 1280. Considering whether one of the defendants was entitled to qualified immunity, the court further held, citing *Tinno*, that "[t]he Tribes' right is and was clearly established," and that "[f]or more than twenty years, the Fort Bridger Treaty has been interpreted to reserve to the Tribes the right to fish on unoccupied lands of the United States." *Id.* at 1286.

ted).[21] Addressing the meaning of the treaty term "to hunt," the *Tinno* court found the Shoshone and Bannock languages "did not employ separate verbs to distinguish between hunting and fishing but rather used a general term for hunting and coupled this with the noun corresponding to the object (either animal or vegetable) sought." *Id.* at 1389. Accordingly, the verb "to hunt" would have been understood to mean "to obtain wild food," and "the English terminology when translated to [the Shoshone and Bannock] leaders . . . would have been understood to encompass both 'fishing' and 'hunting' for game." *Id.* The court also found that "[a]nnual treks to salmon spawning beds in the region which includes the Yankee Fork [of the Salmon River, where the alleged offense occurred] were part of the economic way of life of these Indians since earliest times," *id.* at 1390, and relied on General Augur's report, which showed "hunting and fishing" was discussed at the negotiations, and "the true concern of the tribal negotiators, recognized by the government agents, [was] that the signatory Indians were facing a major change in their way of life and that their traditional food gathering would have to be insured in the future," *id.* at 1389. The court concluded "[t]he history of the Indians, the tenor of the treaty, and the understanding of the treaty by the parties, dictate that the words 'to hunt' be not so delimited as to exclude the right 'to fish.'" *Id.* at 1390 (quoting district court ruling).

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[21] That is especially important here, as "[w]hen the treaty of 1868 was made, the tribe consisted of full-blood blanket Indians, unable to read, write, or speak English." *Shoshone Tribe*, 304 U.S. at 114. The Indian understanding of the treaty was based on their own languages, and the terms of the "treaty was interpreted to them, article by article." Augur Report at 118.

The *Tinno* court then considered whether the place where the fish were taken, which was the Yankee Fork of the Salmon River within the Challis National Forest in Custer County, Idaho, *id.* at 1390-91, was subject to the treaty right. The court emphasized this issue was to be resolved by applying the rules of treaty interpretation, *id.* at 1390 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970)), "keeping in mind the probable understanding of the Indians." *Id.* (citing *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919)). The court found it difficult to "to place a neat and technical geographical construction on [the 1868 Treaty]," *id.* at 1391, noting the 1868 Treaty did not describe the ceded lands, and Brevet Major-General Augur's notes "refer[red] to vast areas of Idaho and surrounding states," *id.* at 1390-91. Accordingly, the court relied primarily on the historical record and the Indian understanding of the treaty. The court found the "signatory Indians had roamed at will and essentially in peace among themselves," and "[t]hey did not in a strict sense occupy the land they roamed; they harvested game, fish, and berries, camas roots, and other natural foods and moved about with the seasonal changes." *Id.* at 1391. Relying on these findings, the court concluded "[i]n agreeing to settle on a permanent basis they still were expecting to harvest food on the unsettled lands as a means of subsistence and as an integral part of their way of life." *Id.*

Furthermore, the court found Article 4 of the 1868 Treaty "refers to the 'unoccupied lands of the United States' and not to 'ceded' lands," and the parties had stipulated the location on the Yankee Fork of the Salmon River where the fishing occurred was within the Challis National Forest and was unoccupied land of the United States. *Id.* Additionally, the record showed the Indians used the Salmon River drainage

for subsistence purposes, took salmon by spear at the spawning beds, and customarily hunted and fished at the Yankee Fork locale. *Id.* On this basis, the court found the area to be covered by the Treaty. *Id.* In so holding, the court relied on the rules of treaty construction, ruling "we must attempt to give effect to the terms of the treaty as those terms were understood by the Indian representatives." *Id.* (citations omitted).

The court then considered the State's power to regulate the Indians' exercise of the 1868 Treaty right. The court began by recognizing the inherent right of the State to regulate the taking of fish and game, *id.* (citing *Geer v. Connecticut*, 161 U.S. 519 (1896)), and its right to regulate Indians in the exercise of off-reservation treaty rights where reasonably necessary to preserve the fishery. *Id.* (citing *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe*, 391 U.S. 392; *State v. McCoy*, 387 P.2d 942 (Wash. 1963)). The court acknowledged the 1868 Treaty had been at issue in *Race Horse*, but found "*Race Horse* and the theory it posited have been entirely discredited by the Supreme Court in *Winans* and *Tulee*, *supra*, and require no further discussion." *Id.* at 1392 n.6.[22] Addressing the

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[22] That issue had earlier been considered by the Idaho Supreme Court in *State v. Arthur*, which expressly rejected the argument that Idaho's Admission to the Union extinguished pre-existing treaty rights, finding subsequent decisions of the Supreme Court had rejected the holding of *Race Horse*. *See Arthur*, 261 P.2d at 139-40. The *Arthur* Court further held neither the Idaho Admission Act nor the Idaho Constitution were intended to abrogate treaty rights; to the contrary, the Idaho Constitution recognizes rights held under treaties entered into prior to statehood. *Id.* at 137-38. Accordingly, Idaho's admission to the Union did not abrogate pre-existing treaty rights, and the recognition of these rights does not violate the State's admission to the Union on an equal footing. *Id.* at 138.

State's power to regulate Treaty fishing under the 1868 Treaty, the court held "spearing a chinook salmon in the Yankee Fork River, certainly cannot be regulated by the state unless it clearly proves regulation of the treaty Indians' fishing in question to be necessary for preservation of the fishery. To require less of the state would emasculate the treaty rights and violate the 'supremacy clause.'" *Id.* at 1393. The court then determined the State had failed to show its regulations were reasonable and necessary for the preservation of the fishery. *Id.* at 1392.

In sum, *Mille Lacs* establishes that *Race Horse* is no longer the law, as the *Tinno* court had earlier concluded, and "'the history of the [1868 T]reaty, the negotiations, and the practical construction adopted by the parties,'" *Mille Lacs*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)), demonstrates that under Article 4 of the Fort Bridger Treaty, the Tribes have the right to hunt and fish on the "unoccupied lands of the United States," *Tinno*, 497 P.2d at 1389-91.

IV. THE TRIBES EXERCISE CO-MANAGEMENT OF THEIR OFF-RESERVATION TREATY HUNTING AND FISHING RIGHTS.

Today the Tribes, under their own regulations and in cooperation with States and the federal government, ensure that off-reservation treaty rights are exercised consistent with the protection of natural resources. *See Mille Lacs*, 526 U.S. at 204. The Tribes regulate their members' treaty hunting off-reservation by law, *see* Tribal Law & Order Code ch. XVII § 4, and annual regulations, *see* Shoshone-Bannock Tribes Fish & Game Comm'n, *2018-2019 Shoshone-Bannock Tribes Big Game Hunting Regulations* (2018). These define what animals may be hunted off-reservation,

id. pt. 2.2, the location, *id.* pt. 2.3, times, and methods of hunting allowed, *id.* §§ VIII-IX, and seasons for each species, *id.* § X. Tribal hunters must obtain species-specific hunting tags, *id.* § XIII, and report the taking of certain species, *id.* pts. 10.1-10.2.

The Tribes also cooperate with state and federal agencies to implement off-reservation conservation programs. These collaborative agreements protect wildlife habitat, thereby supporting fish and game for both Indians and non-Indians alike. For instance, the Tribes have agreements with the U.S. Fish and Wildlife Service that permit a limited ceremonial bison hunt on the National Elk Refuge, under the terms of a special use permit and tribal regulations. Memo. of Agreement between Nat'l Elk Refuge & Shoshone-Bannock Tribes § VIII(B), (E) (2017). The Tribes, the State of Idaho, and the Bonneville Power Administration ("BPA") are parties to memorandums of agreement implementing the Southern Idaho Wildlife Mitigation Agreement ("SIWMA"), under which the State and the Tribes purchase land to replace the acreage adversely impacted by federal hydropower projects in southern Idaho. Under this agreement, BPA provides funding that the Tribes use to purchase and preserve wildlife habitat in southern Idaho, and the Tribes then develop Management Plans for the land that regulate grazing, road closures, access, and "other management practices designed to protect wildlife and their habitats . . . ." SIWMA, BPA & Shoshone-Bannock Tribes §§ 1-4 (1997). The Tribes reserve their treaty rights on the land and the right to put the land into trust. *Id.* § 10. The Tribes and Idaho also allocate

responsibility to purchase the remaining SIWMA mitigation acreage.[23]

Additionally, the Tribes are party to the Columbia Basin Fish Accords, a partnership between tribes, States, and federal agencies to mitigate the effect of dams on fish in the Columbia River basin, including stocks that the Tribes fish in the exercise of their off-reservation treaty rights. *See* BPA, Adm'r's Record of Decision, 2008 Columbia Basin Fish Accords Memo. of Agreement with Shoshone-Bannock Tribes 1-2 (Nov. 2008). Under the Accords, the parties jointly implement projects to protect anadromous salmon, resident trout, and other wildlife that are affected by federal dam projects. *Id.* at 4.

These regulatory measures confirm that the Tribes' Treaty rights are reconcilable with State conservation interests.

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[23] *See* BPA, Adm'r's Record of Decision & Resp. to Comments, S. Idaho Wildlife Mitigation Memo. of Agreement 2 (2014), *available at* https://www.bpa.gov/news/pubs/RecordsofDecision/rod-20140923-Southern-Idaho-Wildlife-Mitigation-Memorandum-of-Agreement.pdf.

CONCLUSION

The judgment of the Wyoming district court should be reversed.

Respectfully submitted,

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